IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

LETTERS PATENT APPEAL NO. 399 OF 2004
IN
WRIT PETITION NO. 6183 OF 2004
AND
LETTERS PATENT APPEAL NO. 400 OF 2004.
IN
WRIT PETITION NO. 6176 OF 2004

Bipin M. Sangar
residing at Tenement
No.A-18/605, Sahakar
Nagar No.2, Sheli Colony
Road, Chembur,
Mumbai-4000 071 ... Appellant.

V/s

1. Maharashtra Housing
   And Area Development
   Authority,Griha Nirman
   Bhavan, Bandra (West),
   Mumbai-51.

2. The Competent Authority-I,
   Maharashtra Housing and
   Area Development Authority,
   Griha Nirman Bhavan,
   Bandra (West), Mumbai-51.

3. Estate Manager-3
   Mumbai Housing and Area
   Development Board, Mumbai.

4. Nirman Umaji
   Nirbhavane, residing
   at Tenement No. B/63/2
   Government Co,oney,
   Bandra (E), Mumbai-400055.

5. State of Maharashtra
   through Housing and
   Special Assitance
   Department. ... Respondents.

Shri Prafulla B. Shah for the appellant.

Shri M.S. Karnik with Mrs. P. Tendulkar for respondent No.4.

CORAM : R.M.S. KHANDEPARKAR &
ANOOP V.MOHTA, JJ.

DATE : 17TH JUNE, 2005.

ORAL JUDGMENT (PER R.M.S. KHANDEPARKAR, J.)

. Since the common question of law and facts are arise in both the appeals, they were heard together and are being disposed of by this common judgment. Heard. Perused the records.

2. The Letters Patent Appeal No. 399 of 2004 arises out of the impugned judgment dated 6th August, 2004, passed in Writ Petition No. 6183/2004 arising out of the judgment dated 28th June, 2004 of the Appellate Authority under Maharashtra Housing Development Act, 1976 in Appeal No. 116/1995. The said appeal was filed by the Estate Manager of the MHADA, to which the appellant was a party-respondent No.2. The Appellate Authority by its Judgment dismissed the appeal filed by the MHADA against the order dated 28th December, 1994, whereby the eviction proceedings against the respondent

No.4, herein were dismissed by the competent authority under MHADA Act. The learned Single Judge has also dismissed the writ petition filed by the appellant against the said judgment of the appellate authority.

3. The Letters Patent Appeal No. 400/2004 arises from the impugned Judgment dated 6th August, 2004 passed in Writ Petition No. 6176/2004 and the said writ petition was filed by the appellant against the judgment dated 28th June, 2004 passed in Misc. Civil Application No. 53 of 1998 by the appellate Authority under MHADA and that was an application for condonation of delay in filing the appeal by the appellant against the order dated 29th August, 1989 of the competent authority whereby the appellant as well as the respondent NO.4 were ordered to be evicted from the suit premises. The appellate authority had rejected the application for condonation of delay and consequently dismissed the appeal. The learned Single Judge also has dismissed the writ petition filed by the appellant against the said judgment of the appellate authority.

4. The few facts relevant for the decision are that

the appellant was inducted in the suit premises by the respondent No.4, who was the original allottee in relation thereof. In eviction proceedings initiated on the ground of subletting, an order of eviction dated 29-8-1989 came to be passed against the respondent No. 4 as well as the appellant. The said order was sought to be challenged by the respondent No.4 by way of Writ Petition No. 2204/1991 to which the appellant was a party respondent. The said Writ Petition No. 2204/1991 was disposed of by the order dated 13th September, 1991, whereby the eviction order to the extent it was passed against the respondent No.4 was set aside and the competent authority was directed to issue a fresh notice to the respondent No.4 to decide afresh the proceeding against the said respondent. The competent authority after complying with the directions issued by this Court under order dated 13th September, 1991 held fresh enquiry and by the order dated 28th December, 1994 directed the restoration of the possession of the suit premises to the respondent No.4. Consequent to the said order necessary proceedings were initiated by the authority in order to restore the possession of the suit premises to the respondent No.4, whereupon the appellant

sought to challenge the order dated 29th August, 1989, by filing an appeal accompanied by an application for condonation of delay being Misc. Civil Application No. 53 of 1998. Simultaneously, the Estate Manager of MHADA also filed an appeal being appeal No. 119/1995 against the order dated 28th December, 1994, passed by the Competent Authority. The appellant was made a party to the said appeal being the respondent No.2. As already observed above, the said appeal as well as Misc. Civil Application came to be dismissed by two separate orders passed on 28th June, 2004, which were carried in writ petitions by the appellant being Writ Petition Nos. 6176/2004 and 6183/2004 respectively. Both these petitions were heard together and were disposed of by the common order i.e. the impugned order dated 6th August, 2004.

5. It is the contention on behalf of the appellant that though the appellant was made a party to Writ Petition No. 2204/1991, he was never served with the notice of the said petition, so also he was not served with the notice in the proceedings after remand before the competent authority, though he was a party. Being

so, the orders passed in those proceedings cannot be said to be binding upon the appellant. In any case once the order dated 29th August, 1989, was set aside against respondent No.4, who was the original allottee and the eviction order dated 29th August, 1989 was passed on the ground of subletting, on setting aside thereof, in the inquiry that followed there was specific finding by the competent authority that there was no subletting and therefore, respondent No.4 was entitled to be restored with the possession of the suit premises and consequently, therefore, the order of eviction even against the appellant did not survive thereafter. Even though, the order passed by the learned Single Judge in Writ Petition No. 2204/1991 was only to the extent of eviction of the respondent No.4, the subsequent proceedings enure to the benefit of the appellant also and failure on the part of the appellant to challenge the order dated 29th August, 1989 cannot be a justification to reject the application for condonation of delay. In alternative, it is argued that once it is held that when there was original allotment in favour of respondent No.4 and the original allottee had inducted the appellant unauthorizedly, the subsequent Government

Resolution issued by the Government on 8th May, 1987 clearly protects the occupation of the appellant in the said premises and he becomes entitled to purchase the same. Being so, there was no question of giving effect to the order dated 28th December, 1994 by evicting the appellant and since there was such an attempt being made, the appellant was entitled to challenge the order of 29th August, 1989 by filing an application for condonation of delay, even in the year 1998. Neither the Tribunal nor the learned Single Judge has appreciated this important aspect while dismissing the application for condonation of delay and the writ petition. The orders passed by both the lower appellate authority as well as by the learned Single Judge are bad in law and need to be set aside.

6. Though it has been vehemently argued before us, that the petitioner though was a party to the Writ Petition No. 2204/1991, he was neither served with the notice of the said petition, nor he was heard in the matter, the record speaks to the contrary. The impugned order clearly records that the appellant was party to the said writ petition. It further records the finding

to the effect that;

> "Applying the principles underlying order 41 Rule 33 of the Code of Civil Procedure, 1908, it was open to the Petitioner to question the correctness of the order dated 29th August, 1989 in the said Writ Petition No. 2204 of 1991 filed by the respondent No.4 before this Court to which he was party. As the petitioner has not taken steps to question the correctness of the order dated 29th August, 1989 and did not address any argument on that basis in Writ Petition No. 2204 of 1991, therefore, even that would be a good ground to sustain the decision of the Appellate Authority in declining to condone the delay in filing the appeal preferred by the Petitioner."

The finding by the learned Single Judge therefore, clearly discloses that the contention which is now sought to be argued about the absence of service of notice in in Writ Petition No. 2204/1991, it was never agitated or argued before the learned Single Judge. It was sought to be argued that the point in that regard was specifically raised in the writ petition before the learned Single Judge and it was even argued. In fact the order delivered by the learned Single Judge, nowhere discloses any such point having been canvassed before the learned Single Judge. Even assuming for the sake of argument that though in the memo of writ petition such

point was raised, unless such point is argued at the time of hearing of the petition, it cannot be presumed that the said point was in fact canvassed before the learned Single Judge. It is to be noted that after disposal of the petitions, the appellant or his advocate did not file any affidavit before the learned Single Judge stating that such arguments were canvassed. It is well settled that in order to dispute the records of the Court, it is necessary for the parties to file the affidavit in that regard before the Court of whose records are sought to be disputed.

7. Undoubtedly the appellant have raised specific grounds under clauses (c),(f),(h),(m) and (q) in the memo of appeal, about the failure on the part of the learned Single Judge to consider the fact that though the appellant was made party to the writ petition No. 2204/1991, no notice of the said petition was given to the appellant nor he had opportunity of being heard in the said petition. However, it is pertinent to note that neither in the grounds nor any where else in the memo of appeal it is stated that the ground about absence of notice of the said writ petition to the

appellant was specifically canvassed before the learned Single Judge and that the learned Single Judge failed to appreciate the same. The statement that the appellant was party to the petition but no notice of the said petition was given to him is different from contending that the said ground was argued and canvassed before the learned Single Judge at the time when the petition was heard. No such statement or submission or contention is found to have been raised even in the memo of appeal. It was only during the argument that point in that regard was sought to be canvassed. As already stated above, it is too late for the appellant to canvass any such argument in this appeal without laying proper factual foundation in that regard.

8. In the circumstances, for all purposes the finding arrived at by the learned Single Judge that the appellant being party to the Writ Petition No.2204/1991 had an ample opportunity to raise the grievance against the order dated 29th August, 1989 is to be confirmed and does not warrant any interference. Even otherwise the principles of constructive res-judicata would apply in this case and more particularly the one which is to be

found under explanation 4 to section 11 of C.P.C. Being so, on the day when the Writ Petition No.2204/1991 was disposed of on 13th September, 1991 and that order having not been challenged even thereafter any time, it has attained the finality in relation to the order of eviction against the appellant and consequently, the order of eviction dated 29th August 1989, has also attained the finality.

9. As regards the point that in view of the order dated 28th December, 1994 by the Competent Authority holding that there was no subletting by the respondent No.4 it results in nullifying the effect of eviction against the appellant on the ground of being sub- lessee and therefore, the order dated 29th August, 1989 in any case is rendered unenforceable as far as it directed eviction of the appellant from the suit premises, it is to be seen that all these contentions are sought to be advanced primarily in view of the Government Resolution dated 18th May, 1987, whereby the Government has adopted the policy that an unauthorised occupation of particular date would be allowed to continue to be in occupation of the premises subject to payment of certain price for the

occupation. As far as order of 29th August, 1989 is concerned, it directed eviction of both the persons viz. the respondent No.4 who was the original allottee and the appellant on the ground of illegal subletting. The High Court in Writ Petition No.2204/1991 merely set aside the eviction order against the respondent No.4 and remanded the issue before the authority relating to the occupation of respondent No.4 alone. The order of this Court in Writ Petition No.2204/1991 clearly specified that the order of 29th August 1989 was set aside to the extent it related to the respondent No.4 only. In other words the eviction order against the appellant was not interfered with. Merely because the said order of 29th August 1989 was not executed or given effect till 13th September, 1991 that would not be a justification to contend that the order of 29th August 1989 had been rendered infructous and more particular so when the scope of adjudication pursuant to the remand after the order passed in Writ Petition No.2204/1991 was restricted to the issue relating to the occupation of respondent No.4 in the suit premises and it did not relate to the occupation thereof by the appellant. There being no scope for adjudication regarding the

status of the appellant to be discussed and decided in the proceedings which took place subsequent to the order in Writ Petition No.2204 of 1991, any order passed in such proceeding cannot enure to the benefit of the appellant nor it can affect the order dated 29th August,1989 as far as it related to the appellant. It is well settled law that any order which affects the rights of any party if allowed to remain in force, even in case of an illegal order, if it is not set aside in due proceeding against such order, it will attain the finality after expiry of the period limitation. Thereafter, it can not be challenged and it becomes enforceable. Albeit it would not be a case in respect of order which is ab-initio bad in law. Further undoubtedly it is nobody’s case that the order dated 29th August 1989 is either ab-initio, bad in law or it was passed by an authority without jurisdiction. The order passed without jurisdiction is always bad in law and nullity thereof can be raised in any proceedings even in collateral proceedings. It is undisputed fact that when the order dated 29th August 1989 was passed, the authority who had passed the order was duly competent to pass such an order. Being so the said

order having remained unchallenged as far as the order of eviction against the appellant is concerned, it attained finality for all purposes and it does not get affected by any subsequent order passed in relation to the status of the respondent No.4 in respect of the suit premises.

10. As regards the Government Resolution dated 18th May, 1987 issued in relation to the right if any having accrued to the appellant does not arise for consideration in this matter. Nevertheless, since certain arguments have been advanced in relation to said Resolution same needs to be considered for the purpose of issue related to the order of eviction against the appellant. The said resolution undoubtedly grants certain protection to the unauthorizedly occupants. The term unauthorised occupant has been explained in the Circular dated 26th May, 1988 and the translation of the relevant clause of the original Marathi circular furnished in this regard by the appellant himself reads thus;

> "Unauthorised flat holders will be accommodated in the scheme. Those residents

> who were not originally allotted the flats and those whose names are not included in the applications of original residents, and also those residents who are not the legal heirs or relatives of the original resident will be deemed to be "Unauthorised Residents". Whether the entry of a resident in the flat is authorised or not will be determined by a guiding test."

Plain reading of these guide-lines which explain the term " unauthorised residents", it is obvious, that in a case where "authorised resident" is found, the question of protecting "unauthorised occupant" would not arise. Once it was held that the premises were allotted in favour of the respondent No.4 and he is the original allottee in respect thereof and further his occupation thereof being legally confirmed by the order dated 13th September, 1991 and he has been held as entitled to be in occupation thereof, one fails to understand as to how the Government Resolution, dated 18th May, 1987 would come to the help of the appellant to contend that the order of 29th August 1989 stood nullified by the order dated 13th September, 1991. The proceeding in relation to the eviction of the allottee are in accordance with the statutory provisions of MHADA, whereas, the the protection assured under the Resolution of 18th May, 1987 is a matter of policy. When statutory provisions

give certain protection to the initially inducted person in accordance with the provisions of law and further the same is confirmed by the proceeding thereunder holding that such allottee is entitled to enjoy the possession legally allotted to him, it cannot be said that mere policy guide-lines to give protection to the unauthorised occupant will override the statutory right acquired by the respondent No.4 in relation to the suit premises. Viewed from this angle also the contention sought to be raised on behalf of the appellant that the order dated 29th August 1989 stands nullified on account of order dated 13th September, 1991 read with the Government circular dated 18th May, 1987, we find the same to be devoid of substance.

11. As no other point has been canvassed we do not find any case being made out for interference in the impugned order and therefore, the appeals fail and they are dismissed with no order as to cost.

12. At this stage, the learned advocate for the appellant prays that the parties be directed to maintain status quo for a period of 12 weeks in relation to the

suit premises. The request in that regard is objected to by the respondent. However we are inclined to order to maintain status quo for a period of 10 weeks from today. Order accordingly.

[R.M.S. KHANDEPARKAR, J.]

[ANOOP V. MOHTA, J.]